(3)

No. 90-233

SEP 4 1990

JOSEPH F. SPANIOL, JR
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DONALD EUGENE RYANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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September 4, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The United States offers no authority to support the assertion that this case is not ripe for review by this Court. There is none. On the contrary, "ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (*quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). The issue of ripeness, moreover, is not an objection to the granting of certiorari. Ripeness is an issue on the merits and the question, if in doubt, should be resolved by this Court after the writ of certiorari is granted. *See Mississippi Power & Light Co. v. Mississippi*, 484 U.S. 813 (1987) (Postponing consideration of jurisdiction question until hearing on the merits).

The Court recently addressed an assertion similar to the Government's in *Mississippi Power & Light Co. v. Moore*, 487 U.S. 354 (1988). There the appellee argued that a decision of the Mississippi Supreme Court was not "ripe" because that decision remanded the case to a lower court for further proceedings. In rejecting that contention, this Court held: "The critical federal question . . . has, however, already been answered by the State Supreme Court and its judgment is therefore ripe for review." *Id.* at 370 n. 11.[1] "Ripeness" is equally present here. A stark conflict among the circuits has developed and will be unaffected by further proceedings upon remand to the trial court.[2]

The Government does not dispute Mr. Ryans' invocation of the Court's jurisdiction under 28 U.S.C. 1254(1), rather it suggests that the Court should not hear the case because it will have an opportunity to hear it later. However, the Government presents no reason why this Court should wait. The United States makes no effort to demonstrate how the adverse positions of Mr. Ryans and the Government would be more fixed by a trial or how the issues would be more clearly drawn than they are now.

This Court's discretion on a petition for a writ of certiorari is broad and not dependent on exhaustion of every possible proceeding in the courts below. It is immaterial that the order reviewed by the Court of Appeals

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[1] Indeed, the Court's holding in *Mississippi Power* should apply *a fortiori* in this case as *Mississippi Power* was brought to this Court under 28 U.S.C. § 1257 which authorizes review only of "[f]inal judgments or decrees" of state courts, whereas the present case is brought to the Court under 28 U.S.C. § 1254 authorizing this Court to review cases from the federal courts of appeals "before or after rendition of judgment or decree."

[2] This view was adopted by the Court of Appeals below. That court rejected the Government's ripeness contention when it was asserted in opposition to Mr. Ryans' motion to stay the mandate, finding this petition "would not be frivolous." Petition App. p. 33a.

was interlocutory. This Court's jurisdiction by writ of certiorari is stated simply as the review of "[c]ases in the courts of appeals . . . before or after rendition of judgment," 28 U.S.C. § 1254, irrespective of the basis for jurisdiction in the court below. The Government invoked the jurisdiction of the Court of Appeals, and the Court of Appeals has rendered its decision. The case is "ripe" for review by writ of certiorari in this Court. Indeed, this Court has often granted review of both civil and criminal cases which arose from interlocutory orders. *E.g., Sanabria v. United States*, 473 U.S. 54 (1978) (criminal case appealed under 18 U.S.C. § 3731); *Serfass v. United States*, 420 U.S. 377 (1975) (same); *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987) (civil case appealed under 28 U.S.C. § 1292); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (same).

The United States also does not attempt to show how the stark conflict among the circuits could be any clearer later than it is now. The uncertainty of members of the bar and the judiciary over the application of the ethical rules of conduct to government attorneys exists now, and waiting to decide this important question will not ease that uncertainty. If Mr. Ryans' petition merits review, none of the considerations for certiorari will be served by deferring review until after a trial and a second appeal. In short, further proceedings below are not likely to aid this Court's consideration of the issues presented. *See Frisby v. Schultz*, 487 U.S. 474, 479 (1988) ("Because the question presented is of substantial importance, and because further proceedings below would not likely aid our consideration of it, we choose to avoid the finality issue simply by granting certiorari").

The Government's assertion that Mr. Ryans is in "precisely the same position he would have occupied if the District Court had denied his motion to suppress" is not only incorrect, it begs the question. Sustaining the Gov-

ernment's argument would needlessly prolong this litigation. The import of the argument is that Mr. Ryans, notwithstanding having properly invoked the Court's jurisdiction, should be required to endure a trial and if convicted prosecute a second appeal, where, if successful, he will have to suffer yet a second trial. More basically, however, the Government's hypothetical is meaningless because the District Court did not deny Mr. Ryans' motion to suppress, it granted it. It was the Government, not Mr. Ryans, which initiated this appeal. The fact that the result would be different if the facts were different does not change the facts as they exist—jurisdiction of this Court is properly invoked and the petition should be considered on its merits.

In this regard, none of the policies which ordinarily make interlocutory orders non-appealable apply here. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (reasons for general rule allowing appeals only from final orders). The policy of allowing a trial court to reconsider its denial of a motion to suppress in a trial context is not served by denying the writ because the Court of Appeals has already reached a decision which is the law of the case. The policy of preventing fragmented litigation is irretrievably lost because the Government has already fragmented this case by bringing this appeal. Nothing but the proliferation of already burdensome and costly litigation is served by denying the writ of certiorari on the ground the United States propounds.

In addition, what the Government proposes should happen in the lower court would be bizarre indeed. Mr. Ryans, to re-raise the issue for a second appeal, would be required to object to the introduction of evidence which the Court of Appeals has already determined is admissible, and as to which the Government will certainly assert *res judicata*. Then, Mr. Ryans would be forced to appeal again to the Court of Appeals the very same

issue which has been previously decided. That exercise is pointless. At the Government's instigation the Court of Appeals has decided the issue, and Mr. Ryans has properly invoked this Court's jurisdiction on writ of certiorari.

No purpose is served by delaying decision on the merits of the petition. Obviously, the Court has discretion to grant or deny the writ, but that decision should be based on the merits, not some strained application of the ripeness doctrine. We respectfully submit the writ of certiorari should be granted.

Respectfully submitted,

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